Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-72

MARILYN COOL,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

EDWARD GENSON
TYCE S. SMITH
100 N. LaSalle Street
Suite 1405
Chicago, Illinois 60602
Attorney for Petitioner

MIDWEST LAW PRINTING CO., CHICAGO 60601, FINANCIAL 6-3988

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The Petitioner, Marilyn Cool, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on April 26, 1972, affirming a judgment of conviction previously entered in the United States District Court for the Southern District of Indiana, Terre Haute Division. Petition for rehearing was denied June 13, 1972.

OPINION BELOW.

The judgment of the District Court is not reported. The opinion of the United States Court of Appeals for the Seventh Circuit has not yet been officially reported. It is reproduced as an appendix to the petition.

JURISDICTION.

The judgment of the Court of Appeals affirming the judgment of conviction and sentence of the District Court was entered on April 26, 1972. Petition for rehearing was denied on June 13, 1972. The jurisdiction of this court is invoked pursuant to the provisions of Title 28, United States Code, Section 1254 (1).

QUESTIONS PRESENTED.

1. Has the defendant's right to substantive due process been violated by shifting the burden of proof to the defendant and negating the presumption of innocence when the cautionary "accomplice instruction" is given when the only persons who would fit the definition of "accomplice" as given in the instruction was a defense witness whose testimony exonerated the defendant and the defendant herself?

2. Has a defendant's right to present witnesses on her own behalf and the right to present a defense been violated when the trial court gives the cautionary "accomplice instruction" where the only person who could be so designated testified for the defense?

CONSTITUTIONAL PROVISIONS.

The Fifth Amendment to the Constitution of the United States provides:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . .

The Sixth Amendment to the Constitution of the United States provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, . . .

STATEMENT OF THE CASE.

(References to the court reporter's transcript appear as "Tr.")

Petitioner Marilyn Cool was indicted on July 31, 1970 with her husband, Michael Wyan Cool and Robert Voyles. All were charged with violating Title 18, United States Code Section 472 in that they with intent to defraud, did possess and conceal counterfeited obligations, securities of the United States.

Robert Voyles appearing as a witness for the defense testified that on June 2, 1970, he and Mr. and Mrs. Cool traveled together from St. Louis, Missouri, to Brazil, Indiana. Mrs. Cool testified that she and her husband were planning to travel on their vacation from their house in Affton, Missouri to visit Mrs. Cool's sister, Carolyn Linenfelser, in New York City. Mr. Voyles stated that he had asked Mr. and Mrs. Cool to travel with them as far as Detroit, Michigan, in order to visit his uncle who resides in Pontiac, Michigan (Tr. 255). At this time, Mr. Voyles had already pleaded guilty to the indictment and was awaiting sentencing. He testified that he had hidden five hundred dollars in counterfeit money in a satchel (Tr. 256) of which Mr. and Mrs. Cool had no knowledge (Tr. 261). While en route to New York, they stopped to eat at a restaurant in Brazil, Indiana (Tr. 259). Although Mr. Voyles' intentions were to go to Detroit and pass the counterfeit money (Tr. 257), he decided to buy a few items in Brazil, Indiana (Tr. 258). He said he left Mr. and Mrs. Cool in the restaurant and requested the keys from Mr. Cool telling him that he

wanted to get some personal property out of the trunk (Tr. 257). At this time, Mr. and Mrs. Cool remained in the restaurant (Tr. 261) while Mr. Voyles went to the trunk of the car, removed the satchel containing the counterfeited money, took a few bills out, and then placed the remaining bills underneath the bumper behind a rubber thing (mud shield by the headlights) (Tr. 258).

Mr. Voyles, who testified as a witness for the defense, then went down the main street in Brazil, Indiana passing counterfeit bills at two stores along the way (Tr. 259-260). At this time, Mr. and Mrs. Cool, the defendants, knew nothing of these occurrences as Mr. Voyles had left them seated at the restaurant (Tr. 261). Upon finishing their meal, Mr. and Mrs. Cool went to the car and began driving toward town looking for Mr. Voyles (Tr. 293). They spotted him walking down the street, pulled their car to the curb and Mr. Voyles entered the car on the passenger side, carrying some packages (Tr. 293). At this time Mr. Voyles had spotted a police car and anticipating trouble, he removed the remaining counterfeit money from his pocket, crumpled it and thrust it underneath the right hand seat of the car, an act which Mr. and Mrs. Cool did not see (Tr. 263-264).

At this time the police approached the vehicle and asked Mr. Voyles if he had been in any stores in the main part of town, to which Mr. Voyles responded "No, sir, I wasn't." (Tr. 293). The police then placed Mr. Voyles under arrest and took him to the station in the police car. Mr. and Mrs. Cool were asked to follow the police car down to the station (Tr. 294).

The testimony of Mr. Voyles and Mrs. Cool agreed in a few minor matters with the government's case all such matters being admitted by the defense in their conten-

tion that they were victims of circumstances beyond their control. On direct examination when asked if he would testify that Mr. Cool did not know anything about the counterfeit money if he indeed had such knowledge, Mr. Voyles answered in the negative (Tr. 270) stating: "Because it all boils down, there—if he was guilty he could take his punishment just like me, but the man is innocent" (Tr. 271). He further answered to the question as to why he was testifying that: "Reason I am testifying, because I am the man that's guilty, and those people didn't have anything at all to do with this. They haven't received one penny from all this transaction, or anything along those lines. They have no knowledge whatsoever. I am not going to let no innocent people go to prison for something I did." (Tr. 276).

After both sides rested their case and the instructions were offered to defense counsel, the following instruction was given over the vigorous objection of defense counsel:

INSTRUCTION NO. 18

An accomplice is one who, with criminal intent, acts with others and participates in the commission of a crime. An accomplice is competent as a witness in a criminal case.

It is a general principle that in considering the credibility of an accomplice that his testimony is open to suspicion for it may be actuated by self-interest, hostility, bias, hope of reward or other motivation, and his testimony should be carefully weighed and tested before giving it unlimited credence. As a general principle it is not safe to accept an accomplice's testimony unless it is corroborated by testimony of other persons or facts and circumstances clearly tending to prove it. His credibility must be determined by you as you will test the credibility of all witnesses as explained in these instructions.

However, I charge you that the testimony of an accomplice is competent evidence and it is for you to pass upon the credibility thereof. If the testimony carries conviction and you are convinced it is true beyond a reasonable doubt, the jury should give it the same effect as you would to a witness not in any respect implicated in the alleged crime and you are not only justified, but it is your duty, not to throw this testimony out because it comes from a tainted source.

I further instruct you that testimony of an accomplice may alone and uncorroborated support your verdict of guilty of the charges in the Indictment if believed by you to prove beyond a reasonable doubt the essential elements of the charges in the Indictment against the defendants.

In determining whether or not the testimony of an accomplice has been corroborated, you will examine all of the evidence to ascertain pursuant to these instructions whether or not there is evidence tending to connect the defendants on trial with the alleged crime from evidence elicited from other sources than the testimony of the accomplice. You will look to the other testimony, and circumstantial evidence. Corroboration does not mean that every detail of the accomplice's testimony be testified to by another witness. Corroboration sought is of such material facts of the accomplice's testimony that would lend or detract from the credence of his testimony of such facts essential to the crime charged. Corroboration may be by direct or positive testimony or it may be by inferences or deductions, drawn from established facts in evidence that in your opinion are warranted or justified or merited. The Court cannot say to you what is corroborated, that is for you to ascertain and determine from all the evidence beyond a reasonable doubt.

REASONS FOR GRANTING THE WRIT.

I. THE INSTRUCTION GIVEN BY THE TRIAL COURT SHIFTED THE BURDEN OF PROOF FROM THE GOVERNMENT TO THE DEFENDANT AND OBVIATED THE PRESUMPTION OF INNOCENCE THEREBY DEPRIVING THE DEFENDANT OF DUE PROCESS OF LAW.

Petitioner, Marilyn Cool, was indicted on July 31, 1970 with two other defendants, her husband, Michael Wyan Cool, and Mr. Robert Voyles. Mr. Voyles pleaded guilty and was awaiting sentencing when the trial of Mrs. Cool commenced. All the defendants were indicted by the Grand Jury of the Southern District of Indiana, Terre Haute Division, and accused of violating Title 18, United States Code, Section 472 in that they with intent to defraud did possess and conceal counterfeited obligations, securities of the United States.

The co-defendant, Mr. Voyles took the stand and testified for the defense and repeatedly stated that the defendants were completely innocent of any complicity in his actions.

Both Mr. Voyles and Mrs. Cool also testified to facts and details which had been admitted by the defense as true. However, the totality of the testimony of Mr. Voyles was the complete exoneration of the defendant. The cautionary "accomplice" instruction was then given by the trial court.

That the presumption of innocence and the harsh burden of proof placed on the government in criminal prosecutions are two of the oldest and most fundamental rights

protected by Constitution cannot be denied. *Coffin* v. *United States,* 156 U.S. 432, 15 S. Ct. 394, 39 L. Ed. 481 (1895).

In *Coffin* the trial court failed to give a charge stating the presumption of innocence while it did give a charge as follows:

> "I do not wish to be understood as meaning that the intent to injure, deceive or defraud is conclusively established by the simple proof of the prohibited act which results in injury. What I do mean is this: That when the prohibited acts are knowingly and intentionally done and their natural and legitimate consequence are to produce injury to the bank or to benefit the wrongdoer, the intent to injure, deceive or defraud is thereby sufficiently established to cast on the accused the burden of showing that their purpose was lawful and their acts legitimate."

The Supreme Court in ruling on this exception to the charge said:

> In addition, we think the 22nd exception to the rulings of the Court was well taken. The error contained in the charge which said substantially that the burden of proof had shifted under the circumstances of the case, and that therefore it was incumbent on the accused to show the lawfulness of their acts was not merely verbal, but was fundamental, especially when considered in connection with the failure to state the presumption of innocence.

The language of the instruction in the instant case in the fourth paragraph states:

> I further instruct you that testimony of an accomplice may alone and uncorroborated support your verdict of guilty of the charges in the Indictment if believed by you to prove beyond a reasonable doubt

the essential elements of the charges in the Indictment against the defendants.

The only persons who could come under this instruction were the witnesses for the defense, Robert Voyles and the defendant, Marilyn Cool. They are the only witnesses who would possibly fall within the definition of accomplice as given in the instruction that: "An accomplice is one who with criminal intent, acts with others and participates in the commission of a crime."

The burden has obviously been shifted as the language of the charges states that critical defense testimony can be used to convict the defendant but there is no statement as to whether such testimony can exonerate.

Of course, the instructions must be taken as a whole to consider the entirety of the effect upon the jury. However, the contextual approach does not relieve the trial judge of his heavy responsibilities in the area of instructing the jury on the applicable law. A judge's charge is reverently reserved by the average jury, be it delivered extemporaneously or carefully scripted. Although such charge on appellate examination will be considered as a cosmos, we must nevertheless be certain that comets of unwisdom are deflected as the charge of the trial judge takes its orbital flight into the jury. See *United States* v. *Driscoll,* 454 F. 2d 702 (1972), citing *Bollenbach* v. *U. S.,* 1946, 326 U.S. 607, 66 S. Ct. 402, 90 L. Ed. 350 at page 795.

The effect of this instruction is substantial. First it gives a definition of "accomplice" which can only mean Robert Voyles or perhaps the defendant, Marilyn Cool. The definition then notes an "accomplice . . . acts with

others" and then says that the jury can convict on the unsupported word of the accomplice.

This progression accomplished several things. First, the jury is given a definition which labels both the witness and the defendant as "accomplices" and then states that the testimony of the witness can convict. This first removes the presumption of innocence and then as the sole question in the case was whether the defendant was a *particeps criminis* shifted the burden of proof to the defendants.

In *United States* v. *Balodimas,* 177 F. 2d 485 (7th Circuit), the trial judge characterized certain defense witnesses as "accomplices" and the court of appeals held that this was an error even if there was evidence in the record to support it as this instruction presupposes that the crime charged had been committed. The converse is established in the instant case as this instruction presupposes that the defendants committed the crime charged by designating Mr. Voyles an accomplice when the only parties he could have been an accomplice were the defendant and her husband. Thus, the presumption of innocence was obviated and the burden of proof shifted to the defense.

In the majority of courts, considering this question, it has been deemed erroneous and reversible error to instruct that the testimony of an accomplice should be discredited when such testimony exonerates a defendant. *People* v. *Howard,* 263 N.E. 2d 633, (Illinois); *Joseph* v. *State,* 34 Tex. Cr. R. 213, 57 S.W. 2d 836; *People* v. *Melone,* 71 Cal. App. 2d 291, 162 P. 2d 505; *People* v. *Hartung,* 101 Cal. App. 2d 292, 225 P. 2d 614; *State of Missouri* v. *Reeder,* 395 S.W. 2d 209; and *State of N. J.* v.

Anderson, 104 N.J. Super 18, 284 A. 2d 438, 23 A C.J.S. Criminal Law 1227, p. 564.

In *Speiser* v. *Randall,* 357 U.S. 513 (1958), the petitioners were denied a tax exemption provided by veterans by the California Constitution solely because they refused to subscribe oaths that they did not advocate the government by force. This Court held that this method of determining whether a claimant was a member of a class shifted the burden of proof to the claimant to prove he was a member of a class and violated the procedural safeguards required by the Due Process Clause of the Fourteenth Amendment. A similar shifting of burden was declared unconstitutional by this court in *Morrison* v. *California,* 291 U.S. 82 (1933). This court in *Sinclair* v. *U. S.,* 263 U.S. 265 (1928) held that in a prosecution for the offense of refusing to answer a question put to the accused as a witness before a committee of the Senate, the burden is upon the United States to show that the question was pertinent to a matter under investigation; any presumption of regularity in that regard is overcome by the presumption of innocence.

With this charge, the trial judge overcame the presumption of innocence and shifted the burden of proof simultaneously.

The defendant did not request the instruction and in fact objected vigorously. This instruction has as a basis for its existence that it brings to the attention of the jury the special relationship between a prosecutor and an accomplice testifying for that prosecutor when the ultimate destiny of the accomplice hinges upon his testimony. A buttress established to shield the defendant has been

transformed by the trial court into a sword thrust at the heart of the defendants; the presumption of innocence is slain stillborn, and the jury directed to return a verdict of guilty.

II. THE DEFENDANT WAS DENIED HER SIXTH AMENDMENT RIGHT TO PRESENT HER WITNESSES ON HER OWN BEHALF AND TO PRESENT A DEFENSE.

In the Supreme Court case of *Washington* v. *Texas,* 388 U.S. 14, the defendant who was charged with murder, attempted to call as a defense witness his co-indictee, who had previously been convicted of the crime. Under the then existing Texas statute, a person charged, or convicted as a co-participant in the same crime could not testify for the defendant on trial.

The United States Supreme Court considered the question in light of the Sixth Amendment's guarantee of a fair trial. The Supreme Court stated in reversing the conviction:

> "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law."
>
> 388 U.S. 14 at 19.

In the instant case, it is true that the defendants were allowed to call as a defense witness, their co-indictee,

Robert Voyles. The essence of Mr. Voyles' testimony, in effect, exonerated the defendants from the crime charged. Mr. Voyles, it should be emphasized, was not called as a witness for the Government, and the labeling of him as an "accomplice" is a conclusion without a foundation. Therefore, the trial court is attempting to accomplish with an instruction what the United States Supreme Court did not allow the Texas legislature to do by statutory law.

The Supreme Court in holding that the Sixth Amendment of the United States Constitution gives a defendant the right to have compulsory process for obtaining witnesses in his favor applies to the States through the Fourteenth Amendment. The Court held that the state denied the defendant the material testimony of a witness who observed certain events and thus denied him the right to have compulsory process for obtaining a witness in his favor.

Since the Sixth Amendment right of compulsory process is applicable, the question is have the defendants been denied that right in the instant case? The answer is clearly in the affirmative. The defendants were allowed to bring their witness before the trial court but this court then obviated the merit of that testimony and after this negation of any value to the defense, decreed it a basis for conviction. The Supreme Court in the case of *In re Oliver,* 333 U.S. 257, 273, observed that:

> "A person's right to reasonable notice of charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel."

The Court cited *Snyder* v. *Massachusetts,* 291 U.S. 97, 116; *Powell* v. *Alabama,* 287 U.S. 45, 68-70; *Hovey* v. *Elliott,* 167 U.S. 409, 418; *Holden* v. *Hardy,* 169 U.S. 366, 390-391; and *Morgan* v. *U. S.* 304 U.S. 1, 14-15. In the instant case the trial judge labeled Robert Voyles an "accomplice" when he testified for the defendant, questioned the credibility of the witness, and labeled the testimony of the witness as coming from a tainted source and instructed the jury further (Tr. 367) that:

> "I further instruct you that testimony of an accomplice may alone and uncorroborated support your verdict of *guilty* of the charges in the Indictment if believed by you to prove beyond a reasonable doubt the essential elements of the charges in the Indictment against the defendants." (emphasis added)

The result of this portion of the instruction is not only to obviate the testimony of the witness as to his exoneration, of the defendants, but as previously noted focuses the jury's minds on the testimony of Robert Voyles as a vehicle of conviction of the defendants rather than one to support the theory advanced by the defense of their innocence. This effectively removed this witness from the defendants and prevented material testimony from a witness who not only observed but according to his testimony was the sole participant in the factual situation under consideration by the jury, from being given any value. The theory supporting this is that the testimony of Mr. Voyles merited less than normal credence by the jury when according to the Supreme Court the opposite is true.

The United States Supreme Court has recently held that statements against penal interest carry their own indicia of credibility. In the recent case of *United States* v. *Harris,* 403 U.S. 573 (1971), the court in considering

the statements against penal interest made by an informant in an affidavit for search warrant, stated:

> . . . common sense in the important daily affairs of life would induce a prudent and disinterested observor to credit these statements. People do not lightly admit a crime and place critical evidence in the hands of police in the form of their own admission, admissions of crime, like admissions against proprietary interests, *carry their own indicia of credibility.* . . . (emphasis added)

Quite to the contrary in the instant case, the trial judge in his instruction gives a defense witness the label of an "accomplice", and then tells the jury not to give much credence to his testimony. Every defendant in a criminal case is entitled to a presumption of innocence and to a fair and impartial trial. In other words, a defendant is entitled to Due Process of law. However, when a trial judge undermines a defendant's absolute right to present his defense, and to have the jury hear and weigh all of the evidence equally, then the most fundamental tenant of the American Criminal Judicial process has been violated. The trial judge in this case has, on the surface, allowed these two defendants to present a defense. But, he has told the jury that their defense, in his opinion, consists of nothing more than a lying accomplice, who although he is speaking against his own penal interest and risking the possibility of being sentenced up to 45 years is not credible.

If ever a trial judge accomplished by indirection what he could not do by direction the trial judge here did just that. He denied the defendants more effectively than if he had refused to allow him to take the stand by attempting to turn favorable evidence of an exonerating nature

against the defendants. The defense offered their theory of the case through their witness, and the trial judge denied them both; thereby refusing them compulsory due process in violation of the Sixth Amendment to the United States Constitution and created obvious substantial error which greatly prejudiced the defendant Marilyn D. Cool.

CONCLUSION.

For the foregoing reasons we respectfully petition this Court to issue its writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

TYCE S. SMITH
100 N. LaSalle Street
Suite 1405
Chicago, Illinois 60602

Attorney for Petitioner

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

SEPTEMBER TERM, 1971 — JANUARY SESSION, 1972

No. 71-1443
UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MICHAEL WYAN COOL and MARILYN D. COOL,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Indiana, Terre Haute Division.
No. TH 70-CR-20
Honorable CALE J. HOLDER, *Judge.*

ARGUED: FEBRUARY 2, 1972 — DECIDED: APRIL 26, 1972

Before KNOCH, *Senior Circuit Judge* and STEVENS and SPRECHER, *Circuit Judges.*

KNOCH, *Senior Circuit Judge.* The Defendants, Michael Wyan Cool and Marilyn D. Cool, were found guilty in a jury trial of violating Title 18 U.S.C. §472, in possessing and concealing, with intent to defraud, counterfeit obligations, securities of the United States. Michael Cool was sentenced to serve ten years and Marilyn Cool, three years. This appeal followed.

There were marked conflicts in the testimony providing several issues of fact which turned on the credibility of the witnesses. A few examples are set out below.

On June 2, 1970, the defendants and Robert E. Voyles traveled together from St. Louis, Missouri, to Brazil,

Indiana. Mr. Voyles and Mrs. Cool testified that the Cools were driving to New York to visit a relative and Mr. Voyles was traveling with them. He said he planned to leave them at Detroit, Michigan, to visit his uncle in Pontiac. At the time he was testifying as a witness for the defendants, Mr. Voyles had already pleaded guilty to an indictment, one count of which charged him with acting in complicity with the defendants to possess and conceal about $8300 in counterfeit $20 Federal Reserve Notes. He testified that he was carrying this counterfeit in a satchel, but he denied that either of the defendants knew that the satchel which he had brought into the automobile contained counterfeit.

He testified further that, unbeknown to the defendants whom he left in a restaurant in Brazil with the excuse that he was going to visit friends, he did pass two counterfeit $20 bills. Other witnesses testified that he bought small items of women's wear in two stores in Brazil. He said that he got the keys to the automobile trunk in which he stowed the satchel from Mr. Cool. He testified that he took a few counterfeit bills only and concealed the sack containing the rest of the counterfeit under the front bumper by the headlight and then returned the keys to Mr. Cool in the restaurant.

As he was leaving the second store in which he had passed counterfeit, he was seen to approach a parked automobile in which both defendants were sitting, Mr. Cool at the wheel. Mr. Voyles was recognized by one of his earlier victims who pointed him out to two Brazil City Police Officers. He was seen entering the passenger side next to Mrs. Cool.

After his arrest, Mr. Voyles rode to the police station in the police car and the two defendants were asked to follow in their own automobile.

Mrs. Cool testified that when Mr. Voyles had not returned after about thirty minutes, knowing that Brazil was not a large town, she and her husband went to look for Mr. Voyles in the main section of town and had just

seen him and pulled over to pick him up when the police arrived. Mr. Voyles testified to the same effect.

The jury could have discredited this explanation of the defendants' presence at the scene of the offense and concluded that they were in fact deliberately waiting to pick up Mr. Voyles knowing the real nature of his errand.

At the police station, the defendants were listed in the arrest reports as Alford and Marilyn Gibbs. Special Agent R. David Freriks testified that the defendants gave him their names as Marilyn and Alford Marvin Gibbs at their initial interview with him.

Mr. Voyles testified that he gave the name of Robert Gibbs as that was the name he was using. He said when he was out of town, he liked to have some kind of identification, even if it were not his own. Officer Harrison testified that Mr. Voyles said he and Mr. Cool were brothers. Mrs. Cool denied giving her name as other than "Marilyn," which Mr. Voyles corroborated, although her husband did give his name as "Gibbs." City Attorney and County Prosecutor John Baumunk testified that the defendants indicated that they were husband and wife.

Mrs. Cool explained this concerted use of the name "Gibbs." She testified that when all three entered the police station, Mr. Voyles had asked the defendants to give the name "Gibbs" because Mr. Voyles did not want his real name on record. She said that her husband complied with this request; she refused to do so.

At the time of her arrest, Mrs. Cool was carrying in her purse the total sum of $568.81 in valid currency arranged in little packets and stowed in various compartments of her purse. Mrs. Cool testified that all this money was the personal property of her husband and herself, that none of it was the proceeds of the various passings of counterfeit and that it was maintained in this fashion merely to keep it handy. Government counsel argued to the jury that it would be a reasonable inference that these individual packets represented the proceeds of in-

dividual transactions in passing counterfeit. It may also be significant that Mr. Voyles was to pay his seller by bringing back 30% of the proceeds of passing the counterfeit.

When the police and the defendants arrived at the police station, they were joined by Mr. Baumunk who produced a paper sack which he said he had seen Mrs. Cool throw from the automobile en route, as she and her husband were following the police car to the station. The sack contained counterfeit money. Mr. Baumunk testified to the circumstances which drew his attention to the defendants' automobile and to the maneuvers he executed which enabled him to see the sack being thrown out, to pick it up and to arrive at the police station almost at the same time as the other two automobiles.

The defendants characterize Mr. Baumunk's testimony as completely incredible. In her testimony Mrs. Cool said that the sack was not in the automobile with her, that she first saw it at the police station, that she was innocent of any contact with counterfeit and that Mr. Baumunk had lied in his testimony. The defense presented a possible explanation for Mr. Baumunk's finding the sack in the road, based on Mr. Voyles' description of his hiding it at the front of the car frame, from which it might have been jolted loose and fallen.

Mr. Voyles testified further that as he sat down in the defendants' automobile, after the second incident of passing counterfeit, he saw the police car, took several counterfeit bills from his wallet, crumpled them up and put them underneath the front seat beside his left leg. He said he was sure that neither of the defendants saw him do that. A policeman came up immediately after that and asked if Mr. Voyles had been doing any shopping in Brazil. Three crumpled counterfeit $20 bills were found later under the right center of the front seat.

Mr. Voyles repeatedly said that the defendants were not parties to his activities, knew nothing of what he was doing and were completely innocent, although, as the government notes, he did corroborate some of the specific facts which went to make up the government's case.

Because many issues did turn on credibility, the defendants argue that it was reversible error to give an "accomplice" instruction over objection of the defense.[1]

They contend that this instruction is in order only where the alleged accomplice testified for the prosecution and not where he confesses himself the sole perpetrator of the crime and fully exculpates the defendants. As they see it, an instruction designed only to protect defendants was used here to destroy the presumption of innocence and the effect of the prior instruction.[2]

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[1] The Court instructed the jury:
INSTRUCTION NO. 18
An accomplice is one who, with criminal intent, acts with others and participates in the commission of a crime. An accomplice is competent as a witness in a criminal case.
It is a general principle that in considering the credibility of an accomplice that his testimony is open to suspicion for it may be actuated by self-interest, hostility, bias, hope of reward or other motivation, and his testimony should be carefully weighed and tested before giving it unlimited credence. As a general principle it is not safe to accept an accomplice's testimony unless it is corroborated by testimony of other persons or facts and circumstances clearly tending to prove it. His credibility must be determined by you as you will test the credibility of all witnesses as explained in these instructions.
However, I charge you that the testimony of an accomplice is competent evidence and it is for you to pass upon the credibility thereof. If the testimony carries conviction and you are convinced it is true beyond a reasonable doubt, the jury should give it the same effect as you would to a witness not in any respect implicated in the alleged crime and you are not only justified, but it is your duty, not to throw this testimony out because it comes from a tainted source.
I further instruct you that testimony of an accomplice may alone and uncorroborated support your verdict of guilty of the charges in the Indictment if believed by you to prove beyond reasonable doubt the essential elements of the charges in the Indictment against the defendants.
In determining whether or not the testimony of an accomplice has been corroborated, you will examine all of the evidence to ascertain pursuant to these instructions whether or not there is evidence tending to connect the defendants on trial with the alleged crime from evidence elicited from other sources than the testimony of the accomplice. You will look to the other testimony and circumstantial evidence. Corroboration does not mean that every detail of the accomplice's testimony be testified to by another witness. Corroboration sought is of such material facts of the accomplice's testimony that would lend or detract from the credence of his testimony of such facts essential to the crime charged. Corroboration may be by direct or positive testimony or it may be by inferences or deductions drawn from established facts in evidence that in your opinion are warranted or justified or merited. The Court cannot say to you what is corroborated, that is for you to ascertain and determine from all the evidence beyond a reasonable doubt.

[2] INSTRUCTION NO. 17
If you find from the evidence that Robert E. Voyles, a co-defendant, has pleaded guilty to the offense charged in count one of the Indictment in and of itself is not evidence of the guilt of the defendants now being tried, or that a crime was committed.

The defendants argue that Mr. Voyles was testifying to his own disadvantage, a circumstance that carried its own indicia of credibility from which the Trial Judge should not have detracted by the "accomplice" instruction. They contend that by referring to Mr. Voyles, who had pleaded guilty, as an "accomplice" the Trial Judge was in effect telling the jury that defendants were guilty. We dd not so read the instruction.

The Fifth Circuit has had occasion recently to consider the question of an "accomplice," defined as one who could have been indicted as a principal or accessory in the offense for which the defendant on trial is charged, when he is a witness called by the defense. The Fifth Circuit in *United States* v. *Nolte*, 1971, 440 F. 2d 1124, 1126-7, cert. den. 404 U.S. 862, reasons persuasively that the better practice is to give the instruction regardless of the party calling the witness.

The defendants would distinguish *Nolte* because there one "accomplice" testified for the government and another for the defense. However, a similar effect was produced here. As indicated, Mr. Voyles' testimony adduced to exonerate the defendants did nevertheless also provide corroborative detail for the government's case. The instructions as a whole clearly left issues of credibility solely to the jury. There was no shift, as defendants complain, in the burden of proof. We find no reversible error in the instructions.

The jury could have concluded from the evidence that the defendants were fully aware of Mr. Voyles' activities and were co-operating with him, that they knew about the counterfeit money in their automobile, that they had agreed in advance to give the same false name if stopped by the police, that Mrs. Cool did attempt to dispose of some of the evidence by throwing it out of the automobile and that the individual packets of money in the various compartments of her purse did represent the fruits of the various transactions handled by Mr. Voyles as part of a common activity.

A Senior Circuit Judge Hastings, speaking for this Court in *United States* v. *Sangster*, 1971, 442 F. 2d 1289, 1293, said:

> It is now axiomatic that in resolving the issue of sufficiency of the evidence to sustain a conviction, questions of credibility and the weight to be assigned to the evidence are for the jury to determine.

After consideration of the evidence in the light most favorable to the government, as we must view it, *Glasser* v. *United States*, 1942, 315 U.S. 60, 80, together with all reasonable inferences susceptible of being drawn from it, we conclude that the government did sustain its burden of proof.

We are asked to review the three-year sentence imposed on Mrs. Cool as excessive and an abuse of discretion. The defendants urge us to consider her as a young lady who has never been a burden to society and who, at worst, is a housewife caught in a morass of unfortunate circumstances, who will not in future constitute any threat to society and whose incarceration will serve no beneficial purpose.

The possible penalties for the offense of which Mrs. Cool was found guilty include a fine of $5,000, imprisonment for 15 years, or both. We do not find here such extraordinary circumstances as would justify our setting aside the sentence of the District Judge. *United States* v. *Rook*, 7 Cir., 1970, 424 F. 2d 403, 406, cert. den. 398 U.S. 966.

The judgment of the District Court is affirmed.

AFFIRMED.

A true Copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

In The
UNITED STATES COURT OF APPEALS
For The Seventh Circuit

June 13, 1972

Before
Hon. Win G. Knoch, Sr. Circuit Judge
Hon. John Paul Stevens, Circuit Judge
Hon. Walter A. Sprecher, Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 71-1443 vs.

MICHAEL W. COOL and MARILYN D. COOL,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Indiana, Terre Haute Division. (TH 70 CR 20)

On consideration of the petition for rehearing and suggestion that it be heard *en banc* filed in the above-entitled cause, no judge in active service having requested a vote thereon, nor any judge voted to grant the suggestion, and all members of the panel having voted to deny a rehearing,

IT IS ORDERED that the petition for a rehearing in the above-entitled cause be and the same is hereby denied.

APPENDIX C

In The
UNITED STATES COURT OF APPEALS
For The Seventh Circuit

June 19, 1972

Before
Hon. Win G. Knoch, Sr. Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 71-1443 vs.

MICHAEL W. COOL and MARILYN D. COOL,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Indiana, Terre Haute Division. (TH 70 CR 20)

On consideration of the emergency motion of defendant-appellant Marilyn D. Cool,

IT IS ORDERED that the issuance of the mandate of this Court be stayed for a period of thirty (30) days in accordance with the provisions of Rule 41(b) of the Federal Rules of Appellate Procedure and to defendant-appellant Marilyn D. Cool only.